

REMARKS

SUPPORT FOR AMENDMENT

Support for the amendment of claims 35-36 and 38-39 may be found in Applicant's claims and specification as originally filed. Accordingly, no new matter has been introduced.

After entry of the instant Amendment, claims 35-40 as amended remain pending in the application. Reconsideration and allowance of all pending claims 35-40 as amended is respectfully requested.

INFORMATION DISCLOSURE STATEMENT

The Office Action indicates that the information disclosure statement filed on 06/30/2003 fails to comply with the provision of 37 C.F.R. §§ 1.97 -1.98 and M.P.E.P. §609 because the 1449 form does not list any references. It has been placed in the application file, but not information referred to therein to be considered as to the merits. Applicant is advised that the date of any resubmission of any item of information contained in this information disclosure statement or the submission of any missing elements(s) will be the date of submission for purposes of determining compliance with the requirements based on the time of filing the statement, including all certification requirements for statements under 37 C.F.R. §1.97(e)."

Applicant acknowledges and thanks the Examiner for such advisory. Upon review of the prosecution history of this application, it appears that the Information Disclosure Statement filed 06/30/2003 was filed in error by previous counsel of record. The Information Disclosure Statement filed on 05/22/2006 should therefore be the only statement of record.

ELECTION/RESTRICTIONS

Applicant thanks the Examiner for acknowledgment of Applicant's traversal. Applicant maintains the previously asserted traversal despite the finality of the restriction requirement. That notwithstanding, Applicant has amended claims 35 and 36 to incorporate Applicant's provisional election.

35 U.S.C. §112

Claims 35-40 are rejected under 35 U.S.C. §112, second paragraph, as being allegedly “indefinite for failing to particularly point out and distinctively claim the subject matter which applicant regards as the invention.” The Office Action further states:

[t]he term “substantial benefit” in claims 35 and 38 is a relative term which renders the claim indefinite. The term is not defined by the claim and the specification does not provide a standard for ascertaining the requisite degree and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention.

Regarding claims 36 and 39, the Office Action indicates “the expression of ‘other microorganisms’ does not set out the metes and bounds of the claim. Recourse to the specification does not define the expression in terms of what are the other microorganisms.”

Applicant respectfully submits that claims 35-36 and 38-39 have been amended to clarify the claimed subject matter. As such, the §112 rejection is now obviated and should be withdrawn.

35 USC § 102(b)

Claims 35-40 stand rejected under 35 U.S.C. §102(e) as being anticipated by U.S. Patent No. 6,649,177 to Howard *et al.* (“the Howard reference”). The Office Action asserts that “US ‘177 disclosed hydrolyzed jojoba oil added to cosmetic compositions to enhance their desirable properties (abstract). The reference disclosed hydrolyzing the jojoba oil by alkali (example 1).” The Office Action then recites the first and second paragraph of page 14 of Applicant’s application as filed to conclude:

“[t]herefore, the reference disclosed the same method as applicant’s method of obtaining the claimed composition that comprises polar hydrophilic salts and non-polar unsaponifiable materials. Hence, since the reference disclosed hydrolyzed jojoba oil produced by the same method as applicant’s method, then the composition produced by the reference will inherently have the same hydrolysis product. Jojoba oil inherently has the same amount of unsaponifiable materials prior to hydrolysis.”

Finally, the Office Action states that

“U.S. ‘177 disclosed adding the jojoba oil product to cosmetic composition including gels (col. 3, lines 4-20). The reference disclosed gel comprising carbomer (col. 16, line 38 till

col. 17, line 18). Applicant disclosed carbomer as one of the acidic gelling agent in page 15, last paragraph. The limitations of claims 35-40 are met by US '177."

For a reference to be anticipating, each and every element of the applicant's claimed subject matter must be contained in the cited reference. MPEP § 2131. Omission of any claimed element or limitation, no matter how insubstantial, is grounds for traversing a rejection based on 35 U.S.C. § 102.

Applicant respectfully traverses this rejection and submits that the rejection is procedurally and substantively defective. As to the procedural merits of the Examiner's rejection, the Examiner failed to examine "each and every element of the applicant's claimed subject matter", as required under MPEP § 2131 (emphasis added). Rather, the Examiner compares the abstract and example 1 of Howard reference to page 14 of applicant's specification to support the conclusion that "the reference disclosed the same method as applicant's method of obtaining a claimed composition that comprises polar hydrophilic salts and non-polar unsaponifiables." It is procedurally incorrect to examine Applicant's *specification* in a §102 rejection. The Examiner reads page 14 of Applicant's application as filed to determine "claimed subject matter", when in the Examiner is limited to *each and every limitation* of the actual *claimed* subject matter (*i.e., the claims*), which the Examiner fails to contemplate. No where in the Examiner's rejection does the Examiner address each and every limitation of claim 35, as amended, which requires "[a] method of providing a composition for topical application, wherein said composition increases substantivity and neutralizes an acid gelling agent; said method comprising the step of adding an effective amount of said composition to the acid gelling agent in order to neutralize the gelling agent; and wherein said composition comprises polar hydrophilic salts and non-polar unsaponifiables, wherein said composition comprises polar hydrophilic salts and non-polar unsaponifiables, wherein said polar hydrophilic salts comprise the products of hydrolysis of a saponifiable fraction of original organic material comprising jojoba oil, wherein said original organic material comprises at least more than about 10 weight percent long carbon chain material prior to hydrolysis".

Applicant respectfully requests that should further examination be required before indication of allowance, that the next Office Action generated by the Examiner be designated as "non-final" so that Applicant may have a chance to respond to a properly formulated rejection as a matter of right.

Regardless of the Examiner's failure to properly formulate a §102 rejection based on Applicant's claimed subject matter, the Howard reference fails to disclose each and every limitation of the claimed invention.

In fact, the Howard reference teaches away from the claimed invention by stating that “the preferred hydrolyzed jojoba protein is in the form of an aqueous dispersion *containing* a mixture of amino acids, peptides and/or protein fractions *derived* from the hydrolysis of naturally occurring jojoba protein”. The formulation disclosed in the Howard reference contemplates hydrolysis of jojoba protein, followed by the *removal* of “mixtures of amino acids, peptides and/or protein fractions” and subsequent treatments and addition of these mixtures to an aqueous dispersion. *See* col.5, lines 5-19. Additionally, Howard teaches *removal of insolubles* of jojoba protein after hydrolysis. *See* col. 4, lines 50-55.

This is wholly different from the present invention, which contemplates a method for providing a “composition compris[ing] polar hydrophilic salts *and* non-polar unsaponifiables, wherein said polar hydrophilic salts comprise the products of hydrolysis of a saponifiable fraction of original organic material.” (emphasis added).

Nowhere does the Howard reference disclose use of polar hydrophilic salts and non-saponifiables as products of a hydrolysis of an organic starting material, to increase substantivity and neutralize a gelling agent. In fact, the Howard reference does not disclose use polar hydrophilic salts at all.

Further, the Howard reference fails to contemplate neutralization of a gelling agent by adding an effective amount of a composition comprising the hydrolysis products of an organic material, wherein the hydrolysis products comprise both polar hydrophilic salts and non-polar unsaponifiables. While the Howard reference does teach a composition for a styling gel in col. 16, line 38 – col. 17, line 18, this composition comprises hydrolyzed jojoba protein where the insolubles have been removed (see discussion above). Moreover, Tables 13 and 14 indicate that TEA (25%) and sodium hydroxide (25%) are used as “pH adjusters”. As such, nowhere in this passage, or anywhere in the Howard reference, is disclosed a composition comprising the hydrolysis products of an organic material, wherein the hydrolysis products comprise both polar hydrophilic salts and non-polar unsaponifiables used in an effective amount to neutralize a gelling agent.

Accordingly, the Howard reference fails to anticipate the claimed invention. As such, Applicant respectfully submits that the §102 rejection is improper and should be withdrawn.

CONCLUSION

No amendment made herein was related to the statutory requirements of patentability unless expressly stated; rather any amendment not so identified may be considered as directed *inter alia* to clarification of the structure and/or function of the invention and Applicant's best mode for practicing the same.

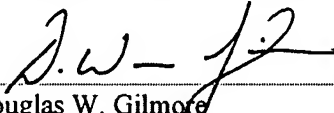
Additionally, no amendment made herein was presented for the purpose of narrowing the scope of any claim, unless Applicant has argued that such amendment was made to distinguish over a particular reference or combination of references. Furthermore, no election to pursue a particular line of argument was made herein at the expense of precluding or otherwise impeding Applicant from raising alternative lines of argument later during prosecution. Applicant's failure to affirmatively assert specific arguments is not intended to be construed as an admission to any particular point raised by the Examiner.

Should the Examiner have any questions regarding this Response and Amendment or feel that a telephone call to the undersigned would be helpful to advance prosecution of this matter, the Examiner is invited to call the undersigned at the number given below.

Respectfully submitted,

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Date: 2/25/2008



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